COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 16, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0915

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

JESSIE M. COX,
by her Guardian ad Litem,
STEVEN L. WILSON, and
DEBORAH A. SEIPP, f/k/a
DEBORAH A. COX,

Plaintiffs-Respondents,

v.

GERALD COX, and TENA COX,

Defendants,

MT. MORRIS MUTUAL
INSURANCE COMPANY,

Defendant-Appellant.

APPEAL from an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

ANDERSON, J. Mt. Morris Mutual Insurance Company (Mt. Morris) appeals from a nonfinal order for summary judgment granting coverage under Gerald and Tena Cox's (the Coxes) policy for injuries Gerald's daughter, Jessie M. Cox, received from a dog bite while at the Coxes' home. The dispositive issue is whether a child of divorced parents, who is injured at her father's home during a period of temporary physical placement (visitation), is a resident of the household and thereby an insured under the father's homeowner's policy subject to the family exclusion provision. We conclude that Jessie was "not living with" the Coxes at the time of the injury and we therefore affirm the trial court's order.

The facts are not in dispute. Gerald Cox and Deborah A. Seipp, f/k/a Deborah Cox, Jessie's parents, were divorced in 1989. They were awarded joint legal custody of Jessie with primary physical placement with Deborah. Gerald was awarded periods of temporary physical placement at reasonable times upon reasonable notice.

On July 28, 1994, Jessie, then eight years old, was visiting the Coxes when she was attacked by their dog and suffered injuries. Thereafter, Jessie, by her guardian ad litem, and Deborah filed a personal injury action against the Coxes. At the time of the dog attack, the Coxes had a homeowner's policy issued by Mt. Morris. The applicable portions of the policy provided:

> [Definition] 5. **"Insured person"** means:
>
> a**. you;**
>
> b person living with **you** and related to **you** by blood, marriage or adoption;
>
> ….
>
> [Exclusion] 17. **We** do not cover **bodily injury** to any **insured person**.

Mt. Morris denied coverage for the claim under the family exclusion clause. Mt. Morris then retained separate counsel for the Coxes. The parties filed competing motions for summary judgment on the issue of insurance coverage. Mt. Morris argued that Jessie is an "insured person" under the policy and therefore falls under the family exclusion clause. Jessie sought summary judgment for coverage. The trial court concluded that Mt. Morris' policy was ambiguous and resolved the motions on public policy grounds. Based on public policy, the trial court concluded that "in the absence of specific contract language to the contrary, a child who is spending periods of temporary physical placement is not 'living with' that parent under facts such as exist in this case." Mt. Morris appeals this nonfinal order. Additional facts will be included within the body of the decision as necessary.

On appeal, Mt. Morris contends that Jessie was clearly an integrated member of the Coxes' household entitling Mt. Morris to summary judgment in its favor. We review a motion for summary judgment using the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes,*** 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995). That methodology is well known and will not be repeated here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.*** at 496-97, 536 N.W.2d at 182; § 802.08(2), STATS. The facts are not in dispute. Rather, the issue on appeal turns on the exclusion clause in the Coxes' homeowner's insurance policy. Construction of an insurance contract is a matter of law that we also decide de novo. *See* ***Whirlpool Corp. v. Ziebert***, 188 Wis.2d 453, 455, 525 N.W.2d 128, 129 (Ct. App. 1994), *aff'd,* 197 Wis.2d 144, 539 N.W.2d 883 (1995).

Mt. Morris maintains that Jessie was an "insured person" under its policy because "she was 'living with' [the Coxes] at the time she was bitten by the family dog." Mt. Morris further asserts that Jessie was an integrated member of the household of the

Coxes because "she was involved in an intimate, informal, and substantial relationship with [the Coxes] such that they would want to benefit and protect her."

"Residents of a household" is a phrase designative of a relationship where persons live together as a family and deal with each other in a close, intimate and informal relationship and not at arm's length. *See* ***A.G. v. Travelers Ins. Co.,*** 112 Wis.2d 18, 21, 331 N.W. 2d 643, 645 (Ct. App. 1983). The determination of whether an individual is a member of the household is based on three factors: (1) living under the same roof; (2) in a close, intimate and informal relationship; and (3) where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their conduct in reliance thereon. *See* ***Pamperin v. Milwaukee Mut. Ins. Co.,*** 55 Wis.2d 27, 36-37, 197 N.W.2d 783, 788-89 (1972). However, no one factor is controlling in the determination; instead, the elements must combine to a greater or lesser degree to establish the relationship. *See* ***id.*** at 37, 197 N.W.2d at 789. Further, the determination of residency is fact specific. *See* ***Ross v. Martini,*** 204 Wis.2d 354, 358, 555 N.W.2d 381, 383 (Ct. App. 1996). When the factors of residency are applied to the current situation, we find that Jessie was not a resident of the Coxes' household and thereby affirm the trial court's finding.

The record indicates that Jessie was not living under the same roof as the Coxes; instead, she resided with Deborah and occasionally visited the Coxes. It is well established that one is not a resident of the household or a member of the family if, even though they have no other place of abode, they come under the family roof for a definite short period of time. *See* ***National Farmers Union Property & Cas. Co. v. Maca*****,** 26 Wis.2d 399, 408, 132 N.W.2d 517, 521-22 (1965). Here, Jessie had a place of abode with Deborah and her visits with the Coxes were of quite short duration, generally not

more than two or three days. Although Gerald maintained a close, intimate relationship with Jessie and intended on continuing a parental relationship, this alone does not make Jessie an insured. Moreover, the sporadic nature and short duration of the visits indicate that the parties intended Jessie's stays to be nothing more than visitation with her father. Finally, Jessie always brought her clothes with her in a suitcase and took her dirty clothes home in a plastic bag and she kept no toys or any other possessions at the Coxes.

This court has held that the intention of the parties is one of the most important evidentiary questions to be considered when determining residents of a given household. *See* ***Lecus v. American Mut. Ins. Co.,*** 81 Wis.2d 183, 190, 260 N.W.2d 241, 244 (1977). In addition, legal custody, when added to a parent's intent to continue a long established living situation with a minor, is generally sufficient to establish residency in a household. *See* ***id.*** Although Gerald and Deborah had joint legal custody of Jessie, Deborah made all of the major decisions on Jessie's behalf. Even though Gerald may have intended to continue the parental relationship, this alone is not enough to establish Jessie as an insured under his homeowner's policy. Because Jessie did not live with Gerald on a regular or frequent basis, it was not possible for her to acquire more than one residence. *But cf.* ***Londre v. Continental Western Ins. Co.,*** 117 Wis.2d 54, 59, 343 N.W.2d 128, 131 (Ct. App. 1983).

Mt. Morris next argues that "living with" is ambiguous. Although "living with" has never been given a clear definition, it has been equated with "residents of the same household." Courts have not found either of these phrases ambiguous; rather, "residents of the same household" has been ruled unambiguous. *See* ***Quinlan v. Coombs,*** 105 Wis.2d 330, 334, 314 N.W.2d 125, 127-28 (Ct. App. 1981). By ruling the term unambiguous, the court stated that the term is capable of "plain and common" meaning and is easily definable to the normal speaker of English. *See* ***id.*** at 334, 314 N.W.2d at 128. Further, an unambiguous term is not made ambiguous because it is difficult to apply

to the facts of a particular case. *See* ***Lawver v. Boling***, 71 Wis.2d 408, 422, 238 N.W.2d 514, 521 (1976). Contrary to Mt. Morris' contention, "living with" is not ambiguous.

Finally, Mt. Morris requests that this court make a decision based on public policy grounds. However, as most recently clarified by our supreme court in ***Cook v. Cook***, No. 95-1963, slip op. at 22 (Wis. Mar. 19, 1997), "The court of appeals, a unitary court, has two functions. Its primary function is error correcting. Nevertheless under some circumstances it necessarily performs a second function, that of law defining and law development, as it adapts the common law and interprets the statutes and federal and state constitutions …." In contrast, the supreme court's primary function is that of law defining and law development. *See* ***id.*** It follows that matters of public policy are to be determined primarily by the supreme court, not this court. *See* ***id***. We decline Mt. Morris' offer to step into the supreme court's shoes.

In sum, we conclude that Jessie was not a member of the Coxes' household at the time of the dog bite incident and is therefore covered under the Coxes' homeowner's policy. We further conclude that the term "living with" is not ambiguous.

By the Court.—Order affirmed.

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